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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 818

Case No. 906: PAUKERT

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mikuin Leliel Balanda, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 10 and 26 October 1995, Libuse Paukert, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 January 1996, the Applicant, after making the necessary corrections, again filed an application containing pleas requesting the Tribunal, inter alia:

> "(a) To hold that during her period of service with the United Nations the [A]pplicant was a victim of a series of decisions taken in violation of Article 100 of the United Nations Charter and of Article 1 of the Staff Regulations;
>
> (b) To award her compensation of an amount of two hundred and fifty thousand Swiss francs for the grave injury both to her career and to her pension entitlements caused by those decisions;
>
> (c) To award her the sum of four thousand Swiss francs in respect of legal costs and expenses."

Whereas the Respondent filed his answer on 5 July 1996;

Whereas, on 21 May 1997, the Applicant filed an additional document with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Office at Geneva (UNOG) in the Economic Commission for Europe (ECE), on an eleven week, special service agreement on 1 October 1962. From this date through 20 July 1984, she served on a total of 45 consultancy or temporary assistance contracts. On her 1963 personal history form, the Applicant was listed as a British citizen, with her nationality at birth as Czechoslovakian.

Although the Applicant had been given 45 contracts with the Organization, and despite two very positive appraisals of her performance, in 1963 and 1968, she had never been granted either a fixed-term or a permanent appointment. On 28 February 1979, the Chief, Secretariat Recruitment Section, wrote to the Executive Officer, ECE, setting out the Applicant's employment record. He noted that:

> "... the above table gives the impression that [the Applicant] is hired to do a job ... essential to the ECE on a regular basis and which I would have thought by now should have been included in the regular work programme rather than assigned to a consultant or temporary staff member.
>
> I would very much appreciate your clarification of the continued hiring of [the Applicant]."

There is no reply on record to the foregoing communication. One of her supervisors noted, "I wish we could find a place for her on our regular staff". Another gave her an overall rating of "outstanding" in her performance evaluation. The Applicant alleges that, at that time, she was told, inter alia, that she could not be given regular employment status as the British quota was full.

On 28 May 1984, the Applicant wrote to the Special Assistant to the Executive Secretary of the ECE that she had been "utterly

astonished ... when you told me that the sole obstacle to my being hired ... was my 'offensive behaviour towards the former Executive Secretary.' ... I had only very pleasant contacts with [him]." By a letter dated 4 June 1993, addressed to the Director, Division of Administration, UNOG, the Applicant requested that she be granted compensation for the material and moral prejudice she had suffered during her 22 years of employment in the United Nations. The Applicant stated that she had received a written declaration dated 20 April 1993, from the former Permanent Representative of the Czech and Slovak Federal Republic at the United Nations in Geneva, certifying that formal instructions had been given by the authorities in Prague to the Chief of Mission of the Czech and Slovak Federal Republic in 1963, during the 1970's and in 1984, to approach the Executive Secretary of the ECE and the UN Personnel Service to ensure that the Applicant would never be given regular employment in the United Nations. These instructions were apparently motivated by the Applicant's "class origin" and the fact that her family had taken her abroad when leaving the country in 1948.

Since the Applicant received no reply to her letter of 4 June 1993, she sent two reminders to the Director, Division of Administration, on 7 September and 1 October 1993. These also remained unanswered.

On 30 November 1993, the Applicant requested the Secretary-General to review the decision to deny the claim for compensation made in her letter of 4 June 1993, which the Applicant inferred from the absence of response to her request.

By a letter dated 5 January 1994, the Chief, Administrative Review Unit, acknowledged receipt of the Applicant's request and informed her that the two month time-limit provided for in staff rule 111.2 (a) (ii) had begun to run as of 17 December 1993.

Having received no reply within the specified time-limit, on 2 March 1994, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB).

The JAB adopted its report on 9 June 1995. Its considerations and conclusions read, inter alia, as follows:

> "23. The Panel first examined the receivability ratione materiae of the present appeal. The Panel noted that the Appellant had specified several times that her appeal was against the refusal of the Administration to entertain her claim for compensation, as clearly stated in her request for review dated 30 November 1994 addressed to the Secretary-General which reads, inter alia, 'Accordingly, I wrote on 4 June 1993 to [...], Head of Administration, United [Nations] Office at Geneva, to bring the matter to his attention and to request compensation for the serious moral and material injury that I have suffered in my career. (...) All these letters remained without an answer. The Organization's silence leads me to the conclusion that the UNOG is not prepared to consider and to respond favourably to my request. I wish to appeal against that refusal. In accordance with staff rule 111.2, I am therefore bringing the matter to your attention, for review of the UNOG's failure to accede to my claim ...' (emphasis added). Consequently, and pursuant to staff rule 111.2 and article 7 of the Rules of Procedure and Guidelines of the Geneva Joint Appeals Board, as well as to the Tribunal's jurisprudence (see, inter alia, UNAT Judgement No. 165, Kahale, paragraph I), the Panel considered that the scope of the present appeal was limited to the specific administrative decision of refusal to entertain the Appellant's claim for compensation.
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> ...
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> 25. ..., the Panel went on to consider its competence to examine the present appeal. The Panel first had to define whether the refusal of the Administration to entertain the claim of the Appellant for compensation constituted an administrative decision in the meaning of staff regulation 11.1. The Panel found that an administrative decision that adversely affects an Appellant can only exist where there is a legal relationship between the two parties. Indeed, an administrative decision is a decision taken by the Administration which unilaterally changes the terms and conditions of employment of the Appellant by affecting his/her rights under the relevant provisions or general

principles of the legal system of the Organization. Consequently, the appeal must indicate some genuine relationship between the complaint and the relevant provisions invoked.

26. The Panel found that in the present case there exists no such legal relationship between the two parties and that the refusal to entertain the Appellant's claim for compensation cannot be considered an administrative decision within the meaning of staff rule 111.2(a) and staff regulation 11.1. Had the Appellant not restricted her appeal to the specific decision of refusal to entertain her claim for compensation, but entered the issue of the alleged breach of Article 100 of the United Nations Charter and of Article 1 of Staff Regulations in the course of her employment within the United Nations, the course of this appeal may have been different.

27. In the light of the above, the Panel decided that the appeal was irreceivable ratione materiae, and that the Panel was not competent to examine it, in accordance with staff rule 111.2 (j). In view of the foregoing, the Panel did not enter the merits of the case, nor did it examine its receivability ratione temporis.

28. The Panel concludes that the Administration's refusal to entertain the Appellant's claim for compensation is not an administrative decision on which an appeal can be based."

On 6 October 1995, the Applicant was advised by the Under-Secretary-General for Administration and Management of the Secretary-General's decision as follows:

"The Secretary-General has conducted an extensive review of this case in the light of the Board's report and has noted that, from 1 October 1962 to 20 July 1984, you have been hired on 45 contracts of consultancy or temporary assistance by UNOG. He has also been apprised of the belated statements of 20 April 1993 by a former CSR [Czechoslovak Socialist Republic] Ambassador to the UN, of 18 March 1994 by a former ECE Executive Secretary and another of 27 March 1994 by a supervisor, asserting the existence of CSR interventions in the previous decades.

The JAB Panel has declined to enter into the merits of this evidence, finding that there was no 'legal relationship between the two parties', nor an 'administrative decision within the meaning of staff rule 111.2(a) and staff

regulation 11.1'. Consequently, the Panel concluded that your appeal was not receivable rationae materiae and it did not examine if it was receivable rationae temporis.

On this last aspect, the evidence tabled at the JAB does not provide any element excusing your delay in submitting, much earlier, an appeal in accordance with Staff Rules and Regulations. Each of the 45 contracts was accepted and signed by you. Any dispute as to the propriety of the offer of those contracts to you is long time-barred and that time bar cannot be eluded by simply, years later, submitting a challenge and then arguing that a failure to reply to that challenge is a fresh decision on the merits of the claim which may be appealed without reference to the time bar.

While it has been recognized that, under certain conditions, a long series of Special Service Agreements (SSAs) by a person performing regular functions of a staff member may create an expectancy of renewal, the Tribunal has held that failure to submit a claim in a timely manner precludes compensation or recalculation of contributory service to the Pension Plan (UNAT Judgement 281, H. de Vittorioso). In this case the time-limit to exercise your right of appeal must be computed from the dates you have voiced concerns on your contractual status which, according to your 'Supplementary Observations' of 30 May 1994, took place 'on a number of occasions' between 1963 and 1980.

The Secretary-General, therefore, considers that your appeal relates to actions taken during the period mentioned above and, being long time-barred, has consequently decided to reject your claim for compensation."

On 23 January 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision by the Organization to accede to political interventions by delegates of the former Czechoslovak Socialist Republic violated Article 100 of the Charter and Article 1 of the Staff Regulations.

2. The Applicant's claim for compensation for the foregoing violations is not time-barred because she never received

notification of the real reasons for the decisions taken by the Organization regarding her employment. For jurisdictional purposes, the time-limit begins to run from the date of such notification, which the Applicant received on 20 April 1993. The Applicant filed a claim for compensation on 4 June 1993; her appeal is therefore timely.

Whereas the Respondent's principal contention is:

Staff rule 111.2(a) specifies time-limits for lodging appeals against administrative decisions. The Applicant's request for a review of the contested decision did not respect the applicable time-limit and is therefore time-barred.

The Tribunal, having deliberated from 9 to 25 July 1997, now pronounces the following judgement:

I. This appeal is based on the Respondent's refusal to consider the Applicant's request for compensation for injurious decisions made with respect to her employment in violation of Article 100 of the Charter and Article 1 of the Staff Rules. After waiting almost six months for a response to her original request for compensation, the Applicant considered that the Respondent's failure to respond constituted an administrative decision and thus requested the Secretary-General to review that decision, in accordance with staff rule 111.2(a). The Respondent notified the Applicant that the two month time limit for review by the Respondent commenced to run on 17 December 1993, expiring on 17 February 1994. The Applicant subsequently filed her appeal to the Joint Appeals Board (JAB) on 2 March 1994, in accordance with staff rule 111.2(a)(ii).

II. The JAB adopted its report on 9 June 1995. It determined that the Applicant's appeal was not receivable ratione materiae

because the underlying refusal by the Respondent to consider the Applicant's request for compensation was not an administrative decision within the meaning of staff rule 111.2 and staff regulation 11.1. The JAB concluded that no legal relationship existed between the parties and, thus, the refusal to consider the Applicant's claim was not a decision that changed the terms and conditions of the Applicant's employment. Because the JAB determined that the Applicant's case was not receivable ratione materiae, the Board did not examine receivability ratione temporis or reach a decision on the merits.

III. The Tribunal finds the determination of the JAB to be in error with regard to receivability ratione materiae. First, the Tribunal rejects the JAB's conclusion that the underlying refusal to consider the claim is not an administrative decision within staff rule 111.2 and staff regulation 11.1 because there was no legal relationship between the parties. To begin with, Staff Rules determining the appropriate joint appeals body to which an appellant should appeal, refers to "former staff members." The implicit assumption is that former staff members may bring grievances arising from their previous employment with the UN to the appropriate reviewing bodies, including the JAB.

IV. Furthermore, article 2(2) of the Tribunal's Statute states that the Tribunal shall be open to any staff member "even after his employment has ceased, and to ... any other person who can show that he is entitled to rights under contract or terms of appointment." The language of the Statute clearly indicates that former staff members and others injured with respect to their UN employment have standing to raise their grievances through the appropriate administrative channels. As the Applicant has noted, the Tribunal has heard cases from former employees of the UN and has not dismissed such cases on grounds of the applicant's status as a

former employee. (Cf. Judgements No. 232, Dias (1978), and No. 320, Mills (1983)).

V. Second, the JAB notes in its report that "[h]ad the Appellant not restricted her appeal to the specific decision of refusal to entertain her claim for compensation, but entered the issue of the alleged breach of Article 100 of the Charter and of Article 1 of the Staff Regulations in the course of her employment within the United Nations, the course of this appeal may have been different." However, the Tribunal finds that the JAB erroneously determined that the Applicant had not placed the alleged breach of Article 100 of the Charter and Article 1 of the Staff Rules before the JAB.

VI. The Tribunal is of the view that the Applicant properly placed the merits of the case before the Respondent in her letter of 30 November 1993, as indicated by her statement "I take the liberty of submitting to you a case of discrimination in employment by the United Nations ..." and her subsequent articulation of her substantive claim. Based on the Applicant's letter and attached annexes, it should have been clear to the Respondent that the Applicant was requesting a review on the merits of her case. Moreover, the Tribunal finds that the Applicant properly placed the merits of the case before the JAB, in laying them out both in her original application and in her subsequent written comments to the JAB. Under these circumstances, the Tribunal is unconvinced by the JAB's observation that the "scope of the present appeal was limited to the specific administrative decision of refusal to entertain the Appellant's claim for compensation." The fact that the administrative decision was in the form of a failure to respond, rather than an explicit rejection of the Applicant's claim, does not change the underlying nature of the claim, i.e., injury due to decisions in violation of the UN Charter and Staff Rules with respect to the Applicant's employment.

VII. The Tribunal does not concur with the JAB's reasoning on receivability ratione materiae because of its erroneous outcome. The Tribunal therefore finds that the Applicant's claim is receivable ratione materiae.

VIII. As to receivability ratione temporis, the documentation demonstrates that the Applicant conformed to all specified time-limits in staff rule 111.2, from the time she initially wrote the Respondent on 30 November 1993, requesting review of UNOG's refusal to consider her claim. The Tribunal finds no fault in the Applicant's conformity to procedure from this date forward.

IX. The Respondent's main contention before the JAB and this Tribunal is that the application is time-barred because this appeal should have been filed within two months of the final date of the Applicant's UN employment on 20 July 1984. According to the Respondent's calculations, the Applicant did not initiate her claim until nine years later and thus her application is clearly time-barred under staff rule 111.2. The Tribunal rejects the Respondent's reasoning but agrees with the Respondent's conclusion.

X. The Tribunal notes that the Applicant presents no less than six sworn statements of persons familiar with her UN employment history who support the allegation that the Applicant was barred from permanent employment with the UN, as a result of political pressure from the authorities of the former Czechoslovak Socialist Republic. Moreover, the Applicant presents evidence of consistent high-quality work, as well as her supervisors' repeated recommendations that she should be hired for a permanent position. Despite a twenty-two year record of recommendations and quality work, the Applicant entered into forty-five short-term and special service agreements contracts without challenging the fact that she was not posted in a permanent position. The Tribunal agrees with

the Applicant that the responses she received to repeated inquiries about her career opportunities, including the British quota and alleged inappropriate conduct, were vague and unsubstantiated. In the face of the span of years and the number of contracts, the Tribunal cannot understand why the Applicant did not present claims during the twenty-two years or at the end of her service. The statements by six persons that violations of the Charter took place, suggest that if the Applicant had questioned the Respondent during or immediately after her service, these responses would have been forthcoming. The Applicant simply continued to accept short-term appointments and special service agreements without challenging the reasons given. Although it is a harsh result, the Tribunal concludes that the Applicant bears responsibility for not raising issues at the time they are relevant. The Tribunal recalls its judgement in Renninger (No. 549 (1994)), that:

> "... delay was plainly detrimental to the Respondent since his financial obligation for the actuarial expense of recognizing past service [for pension purposes] would increase with the passage of time. Under such circumstances, it would be unjust in the extreme to ignore the conduct of the Applicant in delaying for so long the assertion of his claim. ...
>
> ... ordinarily, when timely efforts to vindicate a claim are of importance because of potential prejudice resulting from delay, logic suggests that the starting point for measurement of the delay is the point at which one knows, or should have known, of the existence of the claim ... One acts at one's own peril after a claim arises by unreasonably delaying appropriate steps for vindication of the alleged right." (Emphasis added)

Here, the Applicant should have questioned the reasons for her not being placed in a permanent position. Had she done so, she would have discovered, what, apparently, a number of staff members believed to be the reasons for her not being placed in a permanent

position. To raise these issues nine years after separation and thirty-one years after the alleged abuse began is unacceptable.

XII. For all the reasons stated above, the Tribunal finds that the Applicant's appeal is time-barred.

(Signatures)

Mikuin Leliel BALANDA
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary